Supreme Court, U.S.
FILED

08-670 JUL 02 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

112 D

No.

in the

Supreme Court

of the

United States

TONYA JOHNSON HYLES,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Kevin M. Schad
1001 W. Main St. Suite F
Lebanon OH 45036
513.933.9333
kevinschad@yourattorneys.net
Counsel for Petitioner

QUESTIONS PRESENTED

I.

The life sentence imposed under 18 U.S.C. § 1958A was in violation of the Petitioner's Sixth Amendment jury trial right, as the jury did not specifically find enhancements which increased the Petitioner's sentence from a 10 year maximum to life.

II.

The indictment must be dismissed, as the United States violated a non-prosecution agreement by re-indicting the Petitioner.

III.

In order to obtain a conviction under 18 U.S.C. § 922(g) and 18 U.S.C. § 371 for conspiracy to deliver a firearm to a convicted felon, the United States must prove that the Petitioner had knowledge that the person was prohibited from possessing a firearm.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED. .	3
STATEMENT OF THE CASE.	5
REASON FOR GRANTING THE WRIT. . . .	8

1. The maximum sentence the judge could have imposed at sentencing was 10 years, absent specific jury findings 8

2. The Petitioner's indictment must be dismissed, as the Government violated a non-prosecution agreement by re-indicting the Petitioner 10

3. A conviction for conspiracy to deliver to a convicted felon a firearm requires that the Government prove that the defendant knew that the person was indeed a prohibited person 15

CONCLUSION 17

APPENDIX X

TABLE OF AUTHORITIES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 8

Blakely v. Washington, 542 U.S. 246(2004) 8

Cunningham v. California, 549 U.S. 270 (2007) 8

Hadley v. Williams, 368 F.3d 747 (7th C. 2004) 11

Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963) 11

Ullmann v. United States, 350 U.S. 422(1956) 11

United States v. Alston, 77 F.3d 713 (3rd C. 1996) 15

United States v. Douglas, 398 F.3d 407 (6th C. 2005) 15

United States v. Fitch, 964 F.2d 571 (6th C. 1992) 12

United States v. Little, 753 F.2d 1420 (9th C. 1984) 16

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 11

Wilson v. Washington, 138 F.3d 647 (7th C. 1998) 11

No.

---

in the

Supreme Court

of the

United States

TONYA JOHNSON HYLES

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Tonya Hyles, respectfully prays

that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on April 8, 2008.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported. 521 F.3d 946 (8th C. 2008) That determination is attached hereto in Appendix 1. The District Court's opinion denying the motion to dismiss the indictment is unreported, and is attached hereto as Appendix 2.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 8, 2008. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the *right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; that have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371 states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On August 21, 2000, an assailant entered the home of Coy Smith and murdered him. Two weeks before, Mr. Smith had testified at the preliminary hearing of Tyrese Hyles, the Petitioner Tonya Hyle's then boyfriend. According to the testimony of David Carter, after that testimony, Tyrese Hyles devised a scheme to bond out Carter, and provide him with a car, in exchange for Carter shooting Coy Smith. The Petitioner did bond Mr. Carter out of jail. Petitioner then met with Samuel Anderson. Mr. Anderson, a short time after that meeting, arrived at the Petitioner's home with a firearm, which was placed in a closet. Mr. Carter, who was at the Petitioner's home, immediately left the home with the firearm. Several days later, Mr. Anderson retrieved the firearm from David Carter. Mr. Carter was eventually returned to jail; however, there is no evidence Mr. Carter ever attempted to harm Coy Smith.

Some time later, Ms. Hendrietta Nichols spoke with her boyfriend, Amesheo Cannon, about visiting her. Mr. Cannon lived in Memphis, Ms. Nichols lived with the Petitioner. Pursuant to those discussions, Mr. Nichols asked and received permission to drive the Petitioner's car to Memphis to pick up Mr. Cannon. Mr. Cannon was picked up by Nichols and the Petitioner. Mr. Cannon was later arrested and convicted of shooting Mr. Smith during that visit to Missouri.

The Petitioner was originally indicted in 2001 on charges relating to aiding and abetting a murder for hire, in violation of 18 U.S.C. § 1958A. However, the Petitioner and the United States entered into an agreement which resulted in the Petitioner providing

debriefings and Grand Jury testimony. As a result, on October 24, 2001, the Government dismissed the charges against the Petitioner. Later, the United States claimed that the Petitioner was not being truthful in her 2001 Grand Jury testimony, and sought new charges. On May 5, 2005, the Petitioner was re-indicted in a four count indictment charging her with: one count of conspiracy to use interstate commerce to further a murder for hire scheme, in violation 18 U.S.C. § 1958(A); one count of aiding and abetting murder for hire, in violation of 18 U.S.C. § 1958 and § 2; one count of possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), and one count of conspiracy to deliver a firearm to a felon, in violation of 18 U.S.C. § 922(g).

After indictment, the Petitioner filed several pre-trial motions, including a motion to dismiss, and a motion for specific performance of a plea agreement. Hearings were held on these motions, and on March 6, 2006, the district court entered an order denying both motions. Thereafter, a 4 day trial was held, at the end of which the Petitioner was convicted on all counts. On January 9, 2007, the Petitioner was sentenced to life imprisonment (plus 5 years consecutive for the 924(c) offense), to be followed by 3 years supervised release.

The Petitioner then appealed her conviction and sentence to the Eighth Circuit Court of Appeals, raising the following issues:

I. THE INDICTMENT WAS REQUIRED TO BE DISMISSED BASED UPON APPELLANT'S RELIANCE ON A NON-PROSECUTION AGREEMENT

II. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF USE OF INTERSTATE FACILITIES TO COMMIT A MURDER FOR HIRE OR AIDING AND ABETTING

III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF CONSPIRACY TO DELIVER A FIREARM TO A FELONY

IV. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE

V. THE EVIDENCE AT TRIAL WAS AT VARIANCE WITH THE INDICTMENT

VI. THE GOVERNMENT ENGAGED IN MISCONDUCT DURING CLOSING ARGUMENTS

VII. THE JURY'S VERDICT WAS INSUFFICIENT TO IMPOSE A LIFE SENTENCE

VIII. THE COURT ERRED IN ALLOWING INADMISSIBLE HEARSAY WHICH WAS USED TO SUPPORT AN ELEMENT OF THE OFFENSE

The Eighth Circuit denied the appeal in its entirety on April 8, 2008. (Appendix 1)

REASONS FOR GRANTING THE WRIT

1. The maximum sentence the judge could have imposed at sentencing was 10 years, absent specific jury findings

The Petitioner was convicted of a violation of 18 U.S.C. § 1958A. Under that statute, a defendant's statutory maximum sentence cannot be more than ten years. However, if "personal injury" results, the statutory range increases to 20 years. If death results, the punishment raises to death, or life imprisonment. The Petitioner submits that the findings which raise the range from 10, to 20 years, to life, to death, are findings which must be made by a jury beyond a reasonable doubt. The simple verdict form that the jury was required to use in this case only passed on the issue of guilt, but required no specialized findings under the statute. As such, the life sentence imposed, based upon findings made by the district court at the time of sentencing, violates this Court's recent Sixth Amendment jurisprudence.

In the case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 455 The term "statutory maximum" was further defined by this Court as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 246,303 (2004)(emphasis in original)

In the case of *Cunningham v. California*, 549

U.S. 270 (2007), the Court reviewed the California sentencing scheme using this standard. Under that scheme, as in the federal system, there was a broad statutory range, such as 6 to 18 years. However, the system was set up for a "presumptive" sentence of the middle of that range, unless, at sentencing, certain aggravating or mitigating factors were found by the sentencing court. The Court ruled that such a system violated the Sixth Amendment right to a jury trial. The Court reasoned that "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. While this rule is rooted in longstanding common-law practice, its explicit statement in our decisions is recent." 549 U.S. at — The Court further found "Under California's DSL . . . [] aggravating circumstances depend on facts found discretely and solely by the judge. In accord with Blakely, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum. . . . . Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [], the DSL violates Apprendi's bright-line rule . . ." 549 U.S. at ----

In denying this claim in the instant case, the Eighth Circuit found that the jury necessarily unanimously determined that death resulted from the offense, and therefore, there was no error in not requiring the jury to unanimously determine between the three sentencing factors set forth in 18 U.S.C. § 1958A. However, the Eighth Circuit also recognized

the possibility that there were two distinct conspiracies involved in this case: one which resulted in death, and one which did not. If jury members believed that the Petitioner was involved in the first conspiracy, but not the second, they still could have convicted her of the offense of conviction without a finding that death resulted. As such, there can be no assurance in the jury's verdict, especially in light of the fact that the United States did not seek a specific finding as to the sentencing factors under 18 U.S.C. § 1958A. There is nothing that can be gleaned from the jury verdict sheet which would show how the jury found.

Because the jury only found the Petitioner guilty of a violation of 18 U.S.C. § 1958A, and did not unanimously pass on whether the offense involved personal injury or death, the sentencing court was without ability to enhance the Petitioner's sentence from 10 years to life. As such, the Petitioner's sentence must be vacated.

2. **The Petitioner's indictment must be dismissed, as the Government violated a non-prosecution agreement by re-indicting the Petitioner**

The Petitioner and the United States entered into an agreement which required the Petitioner to cooperate fully in the case, including debriefing and providing testimony. After she provided Grand Jury testimony, the United States dismissed the indictment. Four years later, the United States re-indicted, claiming that the Petitioner violated the agreement by not being completely candid. The re-indictment of the Petitioner, based upon the United States determination

that the agreement was violated, violates due process.

"The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494 U.S. 259,264 (1990) "This command of the Fifth Amendment ("nor shall any person . . . be compelled in any criminal case to be a witness against himself . . . .") registers an important advance in the development of our liberty -- one of the great landmarks in man's struggle to make himself civilized. . . . The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application." *Ullmann v. United States*, 350 U.S. 422,427 (1956)

"The Fifth Amendment, as construed in Bram and as recognized in Smith v. United States, supra, forbids the use of confessions obtained by governmental promises of immunity on the theory that such promises alone render confessions involuntary without requiring the presence of any other coercive circumstances." *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341,378 (1963)(internal cite omit) "Although the law permits the police to pressure and cajole, conceal material facts, and actively mislead [cite omit], it draws the line at outright fraud, as where police extract a confession in exchange for a false promise to set the defendant free." *Hadley v. Williams*, 368 F.3d 747,749 (7th C. 2004)

"[I]mmunity agreements are simple contracts interpreted under basic rules of contract interpretation." *Wilson v. Washington*, 138 F.3d

647,650 (7th C. 1998) In the case of *United States v. Fitch*, 964 F.2d 571 (6th C. 1992), the Sixth Circuit upheld the district court's decision to dismiss an indictment based upon transactional immunity. In that case, the defendant entered into an agreement with the Government to provide cooperation in exchange for transactional immunity. However, during the course of the defendant's cooperation, the Government became convinced that he was lying to them about several matters. This led to them indicting him on substantive charges. The defendant then moved to dismiss the indictment, based upon the immunity agreement.

The court found that, although the defendant lied by implicating innocent persons as part of his cooperation, such lies were not material to the immunity agreement itself. *Id.* at 575 Therefore, the Government was not at liberty to void the agreement. Further, the court found that even if a breach had occurred, there was a limitation of remedies available to the Government. The agreement itself contemplated that if the defendant lied, he could be prosecuted for perjury. Therefore, the court reasoned that only where an immunity agreement explicitly allows voiding of the agreement for lying can there be such an enforceable remedy. *Id.* at 576

There was clearly an enforceable non-prosecution agreement in this case. On June 11, 2001, the United States and the Petitioner signed a proffer letter. That letter stated that the Petitioner was to "submit to an interview with law enforcement officers".(emphasis added) The letter further stated that after that interview, "If the Government determines that your client's [the Petitioner's] information is honest, reliable,

and worthwhile, will the Government enter into any agreement." The proffer letter further indicated "In the event that the information contained in your client's proffer is deemed by this office to be truthful, candid, and meritorious, this office will engage in negotiations involving specific concessions which will be made on behalf of the Government in exchange for your client's further cooperation."

It is undisputed that the Petitioner did sit down and interview with the United States. Further, it cannot be disputed that after that initial interview, something else must have happened, because the Petitioner continued to be interviewed by the United States, and eventually, agreed to be used as a witness for the United States in a Grand Jury session. It is further not disputed that after that testimony before the Grand Jury, the Petitioner's indictment was dismissed, and she heard nothing further from the United States for almost 4 years.

The United States and the Petitioner obviously entered into a transactional immunity agreement after the initial proffer. The proffer agreement (written by the United States) clearly contemplates a further agreement, and concessions, in exchange for continued cooperation. The agreement further contemplates no further cooperation without another agreement in place. The Petitioner continued to cooperate, thus providing a clear indication that a mutual understanding had been reached. No competent counsel would have allowed the Petitioner to continue to cooperate, and provide Grand Jury testimony, if there was no further agreement in place. Further, the actions of the United States clearly indicate an agreement had been reached. The dismissal of the

indictment after the Petitioner's Grand Jury testimony is a strong indication of the terms of the agreement.

Agents testified, at the evidentiary hearing on this matter, that they suspected the Petitioner was not being completely candid with them at the time of the Grand Jury. If this is the case, then the Government had several options. First, they could have persisted in the indictment, which was then currently pending. Second, they could have claimed a breach of the proffer agreement, and litigated that issue. However, to dismiss the indictment, and let the matter lay fallow for 4 years, is completely incongruous with a stance that the Petitioner violated the agreement.

The Eighth Circuit found that the parties had no agreement, and thus, that there was no breach of the immunity agreement. However, the actions of both the Petitioner and the United States belie this finding. First, if there was no agreement in 2001, the Petitioner would not have both debriefed with federal agents and testified at the Grand Jury. Second, if there was no agreement, the United States would not have dismissed the Petitioner from the case after that testimony. The actions of the parties in this case, post-proffer, cannot simply be ignored. The finding of the Eighth Circuit, therefore, must be in error.

Finally, the Petitioner would submit that at a minimum, the district court, and not the United States, should have been the final arbiter as to whether the Petitioner violated the agreement. There has been no finding by any court that the Petitioner materially breached the agreement, so as to allow further action by the United States. The Petitioner submits that due process requires a court to independently determine

whether or not the Petitioner's actions violated the non-prosecution agreement.

3. A conviction for conspiracy to deliver to a convicted felon a firearm requires that the Government prove that the defendant knew that the person was indeed a prohibited person

The Petitioner was charged and convicted of conspiracy to deliver to a convicted felon a firearm. The Eighth Circuit held, in denying the Petitioner's sufficiency of the evidence claim, that a defendant need not know that the person to whom the firearm was being delivered to was a prohibited person in order for this conviction to be upheld. This ruling is in error.

In order to convict a defendant under this statute, the United States must prove: "(1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) the intent to commit the substantive offense". *United States v. Douglas*, 398 F.3d 407,413 (6th C. 2005) "It is well settled that to convict a defendant of conspiracy under the "offense" clause, the government must prove whatever level of *mens rea* is required for conviction of the underlying substantive offense." *United States v. Alston*, 77 F.3d 713,718 (3rd C. 1996)

The Petitioner was convicted of entering into an agreement with another person to deliver a firearm to a convicted felon. The Petitioner submits that the plain language of the statute would require the United

States to prove that the Petitioner knew that the object of the conspiracy was an "illegal objective". The only way the Petitioner could know that the conspiracy was furthering an "illegal objective" would be by knowing that the intended recipient of the firearm was indeed prohibited from legally owning the firearm. Otherwise, if the Petitioner was simply delivering a firearm to a friend on behalf of another friend, under any circumstance, she would committing a federal crime based upon the status of the recipient, regardless of the Petitioner's intent or knowledge. The statute cannot be read so broad as to allow this result.

"18 U.S.C. § 371 is, by definition, a specific intent crime. The *mens rea* requirement of § 371 eliminates any objection that the statute punishes the accused for an offense of which he or she was unaware." *United States v. Little*, 753 F.2d 1420,1443 (9th C. 1984) If the current conviction is allowed to stand, then the mens rea requirement of § 371 will be effectively vacated. For these reasons, the conviction must be vacated.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for dismissal of the indictment.

Respectfully submitted,

Kevin M. Schad
Attorney for Petitioner
Schad & Schad
1001 W. Main St. Suite F
Lebanon OH 45036

APPENDIX

1. Court of Appeals opinion April 8, 2008

2. District Court opinion March 9, 2006

Appendix 1

United States Court of Appeals,

Eighth Circuit

No. 07-1328

UNITED STATES of America,

Appellee,

v.

TONYA JOHNSON HYLES,

Appellant.

Submitted: Nov. 14, 2007.
Filed: April 8, 2008.

Kevin M. Schad, argued, Lebanon, OH, for appellant.

Cristian Stevens, AUSA, argued, St. Louis, MO, for appellee.

Before WOLLMAN, JOHN R. GIBSON, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Tonya Johnson Hyles ("Hyles") of conspiracy to use interstate facilities to commit murder for hire in violation of 18 U.S.C. § 1958(a), aiding and abetting murder for hire in violation of 18 U.S.C. §§ 2 and 1958, possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(I), and conspiracy to deliver a firearm to a felon in violation of 18 U.S.C. §§ 922(g)(1) and 371. She was sentenced to life imprisonment plus five years, and three years of supervised release. She argues that her convictions must be vacated because of: 1) a non-prosecution agreement; 2) insufficient evidence; 3) a variance between the indictment and the evidence at trial; 4) Government misconduct in closing argument; 5) insufficient verdict to impose a life sentence; and 6) two erroneously admitted hearsay statements. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

The facts of this case are set forth in United States v. Cannon, 475 F.3d 1013 (8th Cir.), cert. denied, --- U.S. ----, 128 S.Ct. 365, 169 L.Ed.2d 143 (2007), and United States v. Tyrese Hyles, 479 F.3d 958 (8th Cir.2007). Facts are reiterated here as relevant to Hyles's appeal, presenting them in a light most favorable to the verdict. See United States v. Birdine, 515 F.3d 842, 844 (8th Cir.2008).

On August 10, 2000, in Caruthersville, Missouri, Coy Smith testified against Tyrese Hyles ("Tyrese"), Hyles's husband (then boyfriend). After the preliminary hearing in the state drug case, Tyrese devised a plan to have Smith murdered. He asked David Carter, his

cellmate at the County Jail, to kill Smith. Tyrese promised to have Hyles bail Carter out of jail and to give Carter a 1984 Pontiac in exchange for the murder. Carter agreed. That same day, Hyles bailed Carter out of jail, listing the car as collateral and informing the bondsman that she had just sold Carter the car.

That afternoon, Hyles asked Samuel Anderson to borrow a gun. Anderson agreed to give Hyles the gun and said he would bring it to her house. According to Anderson, Hyles said "that's fucked up that Coy had testified against Tyrese" and "that she's going to get somebody to take care of his ass." Five to ten minutes later, Anderson brought a Beretta stainless steel gun to Hyles's residence. He handed her the gun and told her to place it in the cabinet. Carter, who was hiding in Hyles's house when the gun was delivered, retrieved it from the cabinet and left.

Carter never killed Smith. Instead, he returned the gun to Anderson a couple of days later. He was rearrested on August 18 and taken to the County Jail. There, he saw Tyrese again. Carter testified that Tyrese said "that it was fucked up, he would have did it for me."

About the same time, Tyrese and Hyles were also arranging to have Amesheo Cannon kill Smith. Cannon lived with his mother in Memphis, Tennessee, where he was under parole supervision. Phone records, from the evening of August 10, showed several phone calls made from Tyrese's cell at the County Jail to Hyles's residence-including calls made at 7:50 and 8:34. There were also four calls from Cannon's mother's house in Memphis, to Hyles's house in Caruthersville-at 8:11, 8:23, 8:39, and 8:43. The last call lasted 51 minutes and

overlapped with the second call from Tyrese's jail cell.

April Leatherwood, Cannon's girlfriend, testified that, on August 14, Cannon called *952 her from Memphis, saying that Hyles was driving him to Caruthersville from Memphis. Hendrietta Nichols, also Cannon's girlfriend, testified that she and Hyles drove to Memphis to pick up Cannon and that Cannon drove them all back to Caruthersville. A couple of days later, Anderson gave Cannon the same gun he had originally given Hyles. He testified that he saw Cannon get out of the passenger side of Hyles's Pontiac, but could not see the driver. According to Anderson, Cannon stated that he was going to "take care of that for Tyrese."

On August 20, Hyles and Cannon drove by Smith's house. Hyles was driving the Pontiac, with Cannon in the passenger seat. Afterwards, Hyles and Cannon went to the County Jail to talk to Tyrese. They were seen yelling up to Tyrese's cell window from outside the jail. The next morning, on August 21, the police found Smith shot to death in bed.

Several days later, Cannon told Anderson how he killed Smith, explaining how he shot Smith one time behind the head and then fired another shot. On August 29 and September 3, Cannon was issued traffic summonses while driving the Pontiac. A sheriff's deputy also recovered photographs from Cannon's jail cell depicting the Pontiac, and Tyrese and Cannon posing together.

II.

Hyles claims that her convictions must be vacated because the Government violated a non-prosecution agreement.

[1] [2] [3] This court reviews de novo the interpretation and enforcement of a non-prosecution agreement. United States v. Glauning, 211 F.3d 1085, 1087 (8th Cir.2000). Within the context of constitutional safeguards for due process, non-prosecution agreements may be enforced under principles of contract law. United States v. Crawford, 20 F.3d 933, 935 (8th Cir.1994). "Only a material breach is sufficient to excuse the government of its performance." Id.

As relevant here, the proffer letter stated:

It is my understanding that Tonya Johnson Hyles wishes to explore the possibility of cooperating with the U.S. Government....

Before the Government comes to an agreement with Tonya ..., she must submit to an interview ... for the purpose of assessing the credibility and value of the assistance, evidence and possible testimony that she can provide. Only if the Government determines that your client's information and ability to develop information is honest, reliable and worthwhile, will the Government enter into any agreement....

With respect to and in exchange for your client's

proffer, the only promises made on behalf of the Government in consideration for the proffer are as follows:

(1) Unless otherwise provided herein, any statement made by your client will not be used directly against her in the present or any subsequent prosecution....

At this time the Government is not entering into any plea agreement or negotiations or representing that it will enter into any plea agreement or negotiations. Any plea agreement or negotiations the Government may enter into will be determined after the interview and shall be left to the sole discretion of the United States Government.

Hyles signed the letter, indicating she understood "there are no promises by the Government to enter into any agreement."

The first indictment against Hyles was dismissed subsequently. At an evidentiary hearing on this issue, the FBI agent testified:

We knew she had been lying. I think at that point, myself and Mr. Price felt like she still was not giving us everything she knew. The indictment was not dismissed because we thought she was telling the truth and telling us everything that she knew about it. That's certainly not the reason for the dismissal of the indictment.

The FBI agent also asserted that the indictment was dismissed because "the trial date on Ms. Hyles was approaching, was quite near, and we had the issue of pursuing charges against Mr. Cannon and Mr. Hyles, and those were the primary focus." The agent further replied yes to whether Hyles had "stopped being a useful witness on February 8th of 2005."

[4] The district court FN1 found that there was no agreement: "The record is clear, however, based on the proffer letter, defendant's actions vis a vis the proffer, the determination by the United States Attorney's office that defendant had not given complete, truthful and candid information, and the testimony presented to the Court that an agreement defendant seeks to enforce was never formed." The court did not err in this conclusion.

FN1. The Honorable Henry Edward Autrey, United States District Judge for the Eastern District of Missouri, adopting the report and recommendations of the Honorable Lewis M. Blanton, United States Magistrate Judge for the Eastern District of Missouri.
The proffer letter was not a non-prosecution agreement. The letter contained an agreement to "engage in negotiations involving specific concessions" by the Government in exchange for further cooperation if the Government believed the information in the proffer was "truthful, candid and meritorious." The letter also provided use immunity (with some limitations). However, these provisions do not amount to a non-prosecution agreement. Moreover, the fact that the Government dismissed the first indictment does not establish a non-prosecution agreement. The first indictment was not dismissed due to Hyles's past

cooperation or the expectation of future cooperation. The Government had concerns about her truthfulness and decided, instead, to focus on the Tyrese and Cannon prosecutions. Therefore, the Government did not breach a non-prosecution agreement.

[5] Hyles contends the district court erred in not making an independent determination whether she materially breached the agreement. Because there is not a non-prosecution agreement in this case, the court did not err.

[6] Hyles further argues the Government violated her Fifth Amendment rights by using her statements, made under the agreement, against her at trial. At trial, the Government introduced excerpts from Hyles's Grand Jury testimony. The proffer letter, though, expressly stated: "Further, if your client knowingly provides untruthful information or if she knowingly withholds the full truth from Government agents ... during the course of the proffer, the promise not to directly use what she says against her shall be null and void...." Because Hyles signed the letter, indicating she understood it, and the Government believed she was knowingly withholding the full truth, the use of her Grand Jury testimony against her at trial did not violate her Fifth Amendment rights. See United States v. McFarlane, 309 F.3d 510, 514 (8th Cir.2002) ("While [t]he protection given a defendant by an immunity agreement is coextensive with the protection against self-incrimination afforded by the Fifth Amendment, the immunity agreement itself governs the scope of the immunity*954 involved.") (internal quotation marks and citations omitted).

III.

Hyles insists that there is insufficient evidence to convict her for: 1) conspiracy to use interstate facilities to commit a murder for hire or aiding or abetting; 2) conspiracy to deliver a firearm to a felon; and 3) possession of a firearm in furtherance of a crime of violence.

[7] [8] "We review de novo the sufficiency of the evidence, viewing the evidence in the light most favorable to the jury verdict and giving the verdict the benefit of all reasonable inferences." United States v. Birdine, 515 F.3d 842, 844 (8th Cir.2008). "We reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." Id. "The standard to be applied to determine the sufficiency of the evidence is a strict one, and the finding of guilt should not be overturned lightly." United States v. Tensley, 334 F.3d 790, 794 (8th Cir.2003). "If the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." Id.

A.

Hyles declares there was insufficient evidence to convict her for conspiracy to use interstate facilities to commit murder for hire. See 18 U.S.C. § 1958(a) ("Whoever ... uses or causes another ... to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or

agreement to pay, anything of pecuniary value, or who conspires to do so, shall be ... imprisoned.").

[9] [10] To convict for conspiracy to commit murder for hire, the government had to prove that there was an agreement to kill Smith, that Hyles knew of this agreement, and that Hyles intentionally joined this agreement. See United States v. Cannon, 475 F.3d 1013, 1020 (8th Cir.2007). The Government must offer enough evidence to prove Hyles's connection to the conspiracy beyond a reasonable doubt. See id., citing United States v. Lopez, 443 F.3d 1026, 1028 (8th Cir.) (en banc), cert. denied, --- U.S. ----, 127 S.Ct. 214, 166 L.Ed.2d 172 (2006). The conspiracy may be shown by direct or circumstantial evidence. Cannon, 475 F.3d at 1020.

First, Hyles argues there is no evidence that she used interstate facilities or commerce with the intent to further or promote the murder for hire. More specifically, she asserts the evidence did not show that the use of the interstate facilities actually furthered the conspiracy. This argument is unavailing.

[11] The Government presented evidence of several phone calls from Cannon's mother's home in Memphis to Hyles's home in Caruthersville. One call overlapped with a call from Tyrese's jail cell. Additionally, Cannon's two girlfriends testified that Hyles went to Memphis to pick up Cannon and bring him back to Caruthersville. The Government also demonstrated that Hyles drove Cannon by Smith's house and took Cannon to visit Tyrese at jail the evening before the murder. According to the evidence, Hyles (or someone driving her car) took Cannon to get the gun. This

evidence, though circumstantial, is sufficient to show the use of interstate facilities with the intent to further the conspiracy.

[12] Second, Hyles contends there is no evidence of a promise to pay anything of pecuniary value to Cannon. Nevertheless, Hyles concedes that Carter was promised a vehicle and getting bonded out of jail. The promise to Carter is sufficient to show "a promise or agreement to pay, *955 anything of pecuniary value." See 18 U.S.C. § 1958(a). Because this is a conspiracy, the Government was not required to show that Cannon-the person who committed the offense-was promised something of value. It met its burden by showing that Carter, another member of the conspiracy, was promised something of value. Moreover, the Government did show circumstantially that Cannon received the Pontiac for the murder of Smith. Cannon was stopped and issued two traffic summonses after the murder while driving the Pontiac, and a sheriff's deputy found pictures in Cannon's jail cell of the car and of Cannon and Tyrese posing together. Viewing the evidence most favorably to the jury verdict, it is reasonable to infer that Cannon was given the car in exchange for killing Smith.

[13] Third, Hyles maintains the Government failed to prove she knowingly joined a conspiracy with Cannon to murder Smith. To convict Hyles of conspiracy, the Government had to prove, as one element of the offense, that an agreement existed among two or more people to accomplish an illegal purpose. See United States v. Guel-Contreras, 468 F.3d 517, 521 (8th Cir.2006). The Government did show, and Hyles does not argue otherwise, that she had an agreement with Carter, Anderson, and Tyrese, to kill Smith, and that

she knew of the agreement and intentionally joined the agreement. Contrary to Hyles's assertions, the Government also showed she knowingly joined a conspiracy with Cannon to murder Smith. The Government presented evidence that several phone calls were placed from Cannon's residence to Hyles's around the same time Hyles and Tyrese were conspiring with Carter to kill Smith, that Hyles drove to Memphis to pick up Cannon and bring him to Caruthersville a few days before the murder, and that Hyles drove Cannon by Smith's house the evening before the murder. Viewing the evidence most favorably to the jury verdict, this is sufficient to show that Hyles knowingly joined a conspiracy with Cannon to kill Smith. See United States v. Pizano, 421 F.3d 707, 719 (8th Cir.2005) ("Proof of a formal, explicit agreement is not necessary; rather, '[t]he government need only show that those involved operated pursuant to a common scheme or had a tacit understanding.' "), quoting United States v. Mickelson, 378 F.3d 810, 821 (8th Cir.2004).

[14] [15] Lastly, Hyles objects that her conviction must be vacated because no witness at trial ever identified her as the person about whom they were testifying. " 'Courtroom identification is not necessary when the evidence is sufficient to permit the inference that the defendant on trial is the person who [committed the acts charged].' " United States v. Capozzi, 883 F.2d 608, 617 (8th Cir.1989), quoting United States v. Hoelscher, 764 F.2d 491, 496 (8th Cir.1985). Viewing the evidence most favorably to the jury verdict, the evidence was sufficient to show that Hyles committed the acts charged. Hyles was identified by her attorney in opening statement, her identity was not contested at trial, and several witnesses testified they knew Hyles from living in Caruthersville. See Butler v. United

States, 317 F.2d 249, 254 (8th Cir.1963).

B.

[16] Hyles claims there was insufficient evidence to convict her for conspiracy to deliver a firearm to a felon. Specifically, she alleges the Government failed to prove she knew that Carter was a convicted felon and that he was prohibited from obtaining a firearm. See 18 U.S.C. § 922(g)(1), § 371.

Viewing the evidence most favorably to the jury verdict, the evidence was sufficient to show that Hyles knew Carter was a convicted felon. Carter testified he lived *956 in Caruthersville his whole life, had known Hyles his whole life, and their mothers were friends. He stated his past felony convictions, at the time of the murder for-hire conspiracy, were burglary, unlawful use of a weapon, shooting into a dwelling, and drug possession. Also, the bond papers, which Hyles signed, indicated that Carter was charged with felony stealing.

The Government was not required to prove that Hyles knew Carter was prohibited from obtaining a firearm; it had to prove only that Hyles knowingly provided Carter with a firearm. See United States v. Kind, 194 F.3d 900, 907 (8th Cir.1999) ("it is well settled in this circuit that the government need only prove defendant's status as a convicted felon and knowing possession of the firearm"); United States v. Lomax, 87 F.3d 959, 962 (8th Cir.1996) ("[T]he 'knowingly' element of section 922(g) applies only to the defendant's underlying conduct, not to [her] knowledge of the

illegality of [her] actions."). The Government showed that Hyles knowingly provided Carter with a firearm to kill Smith, which was sufficient to convict Hyles for conspiracy to deliver a firearm to a felon.

C.

Hyles asserts the Government failed to prove that she possessed a firearm in furtherance of the murder-for-hire conspiracy. See 18 U.S.C. § 924(c)(1)(A).

[17] "To secure a conviction under § 924(c)(1)(A), the government must present evidence from which a reasonable juror could find a 'nexus' between the defendant's possession of the charged firearm and the ... crime [of violence], such that this possession had the effect of 'furthering, advancing or helping forward' the ... crime [of violence]." See United States v. Sanchez-Garcia, 461 F.3d 939, 946 (8th Cir.2006), quoting United States v. Hamilton, 332 F.3d 1144, 1149-50 (8th Cir.2003).

[18] [19] [20] Possession of a firearm may be either actual or constructive. United States v. Johnson, 474 F.3d 1044, 1048 (8th Cir.2007). "Constructive possession of the firearm is established where the suspect 'has dominion over the premises where the firearm is located, or control, ownership, or dominion over the firearm itself.' " United States v. Smart, 501 F.3d 862, 865 (8th Cir.2007), cert. denied, ··· U.S. ····, 128 S.Ct. 1258, 170 L.Ed.2d 94 (2008), quoting United States v. Sianis, 275 F.3d 731, 733 (8th Cir.2002).

"Possession may be joint; it need not be exclusive." Smart, 501 F.3d at 865.

[21] Viewing the evidence most favorably to the jury verdict, there was sufficient evidence that Hyles possessed the firearm. Anderson testified he brought the firearm to Hyles's house and handed it to her. He told her to place it in the cabinet, which she did. After Anderson left, Hyles told Carter the firearm was in the cabinet. Carter retrieved it and left. This evidence supported actual possession by Hyles.

[22] Contrary to Hyles's assertions, there was sufficient evidence that Hyles possessed the firearm in furtherance of the murder-for-hire conspiracy. When Hyles asked Anderson to borrow a firearm, she stated, "that's fucked up that Coy had testified against Tyrese" and "that she's going to get somebody to take care of his ass." Additionally, she knowingly gave the firearm to Carter, who was hired (bailed out of jail and given a car) to murder Smith. This is sufficient evidence for a conviction under section 924(c). See Sanchez-Garcia, 461 F.3d at 946 (possession must have the effect of furthering, advancing or helping forward the crime of violence).

*957 IV.

According to Hyles, a variance exists between the indictment, which alleges one overall conspiracy, and the evidence at trial, which demonstrates two separate conspiracies.

[23] [24] [25] Because this issue was not raised with the district court, this court reviews for plain error. See United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "[B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Pirani, 406 F.3d 543, 550 (8th Cir.2005) (en banc). The burden is on the defendant to prove plain error. Id.

[26] "A variance arises when the evidence presented proves facts that are 'materially different' from those [alleged] in the indictment." United States v. Whirlwind Soldier, 499 F.3d 862, 870 (8th Cir.2007), cert. denied, --- U.S. ----, 128 S.Ct. 1286, 170 L.Ed.2d 112 (2008), quoting United States v. Harris, 344 F.3d 803, 805 (8th Cir.2003). The defendant's substantial rights are infringed when: "(1) the defendant could not reasonably have anticipated from the indictment the evidence to be presented against him; (2) the indictment is so vague that there is a possibility of subsequent prosecution for the same offense; or (3) the defendant was prejudiced by a 'spillover' of evidence from one conspiracy to another." United States v. Barth, 424 F.3d 752, 759 (8th Cir.2005), quoting United States v. Jones, 880 F.2d 55, 66 (8th Cir.1989).

[27] Hyles appears to argue she was prejudiced by the spillover of evidence from one conspiracy to another, insisting the first conspiracy included Tyrese, Carter, Anderson, and herself, while the second conspiracy only included Tyrese, Cannon, and herself. Hyles concludes

there was no evidence to demonstrate her knowing involvement in the second conspiracy, or that her actions were in furtherance of that conspiracy. She claims that because the second conspiracy resulted in Smith's death, being not guilty of that conspiracy would significantly lower her sentence. See 18 U.S.C. § 1958(a) (requiring imprisonment of not more than 10 years if personal injury or death does not result). Assuming without deciding that the facts here show two conspiracies rather than one, the evidence clearly shows that Hyles participated in both conspiracies. See United States v. Pizano, 421 F.3d 707, 720 (8th Cir.2005) ("In a case where the evidence shows that the defendant was a member of each proven conspiracy, the danger of prejudicial spillover 'is minimal, if not non-existent.' "), quoting United States v. Scott, 511 F.2d 15, 20 (8th Cir.1975). Therefore, even if a variance existed, Hyles's substantial rights were not infringed.

V.

Hyles alleges she was denied the right to a fair trial because the Government engaged in improper closing argument. Specifically, she claims the Government improperly injected the contents of phone and in-person conversations between Hyles, Tyrese, and Cannon, none of which were in evidence.

Hyles also asserts the Government improperly vouched for its own witnesses. The Government during rebuttal stated:

You know, he talks about Anderson and Carter and

about how their stories aren't entirely consistent, but then on the other hand, he's talking about how *958 we put this whole story together. Well, we must not have done a very good job if we can't get their stories consistent, right? Well, the reason their stories are inconsistent in some ways is because they are telling the truth...."

The Government reiterated that Carter "told you the truth."

[28] [29] [30] The district court has broad discretion in controlling closing arguments. United States v. DeGarmo, 450 F.3d 360, 365 (8th Cir.), cert. denied, --- U.S. ----, 127 S.Ct. 516, 166 L.Ed.2d 384 (2006). "To obtain a reversal for prosecutorial misconduct, the defendant must show that (1) the prosecutor's remarks were improper, and (2) such remarks prejudiced the defendant's rights in obtaining a fair trial." Id. Because Hyles did not object, this court will review for plain error. See United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); United States v. Frokjer, 415 F.3d 865, 873 (8th Cir.2005). "[I]f an arguably improper statement made during closing argument is not objected to by defense counsel, we will only reverse under exceptional circumstances." United States v. Mullins, 446 F.3d 750, 758 (8th Cir.), cert. denied, --- U.S. ----, 127 S.Ct. 284, 166 L.Ed.2d 217 (2006).

[31] Here, there is no plain error. The phone conversation between Hyles, Tyrese, and Cannon, took place the evening of Smith's preliminary testimony. Hyles had already bailed Carter out of jail, borrowed a gun from Anderson "to get somebody to take care of

[Coy's] ass," and given the gun to Carter. The in-person conversation between these three occurred the night before Smith's murder. Immediately before this conversation, Hyles drove Cannon by Smith's house. Additionally, Cannon had already received the gun back from Anderson. Based on these facts and other facts presented at trial, it is reasonable to infer that Hyles was "updating Cannon on where we are here" and telling Tyrese, "Look who I have here, Cannon is in town." See Frokjer, 415 F.3d at 874 ("Prosecutors are entitled to argue reasonable inferences to be drawn from the facts in evidence during closing arguments.").

[32] Moreover, it was not improper during rebuttal for the Government to say its witnesses were telling the truth. Hyles's counsel during closing argued Carter's testimony was motivated by his desire to get released from jail early and that the inconsistencies in his testimony was "because he is lying to us." Hyles's counsel also argued that Anderson had similar motivations, implying he also lied. On plain error review, the Government's response to these attacks was not improper. See United States v. Ziesman, 409 F.3d 941, 954 (8th Cir.2005) ("In closing arguments, a prosecutor is entitled to make a fair response and rebuttal when the defense attacks the government's case.").

VI.

Hyles maintains that because the jury was not asked to come to a unanimous verdict, or make a determination, as to the factual findings supporting her 18 U.S.C. § 1958(a) conviction, her life sentence violated her Sixth

Amendment right to a jury trial and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In particular, Hyles insists the jury did not make a specific finding that death resulted from the murder-for-hire conspiracy.

[33] This court reviews de novo constitutional challenges to a sentence. United States v. Bradford, 499 F.3d 910, 919 (8th Cir.2007), cert. denied, 76 U.S.L.W. 3454 (U.S. Feb. 25, 2008) (No. 07-7829). In Apprendi, the Court ruled: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond *959 the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S.Ct. 2348; see also Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and United States v. Booker, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Section 1958(a) provides that a life sentence may be imposed if death results from violation of the statute. 18 U.S.C. § 1958(a).

[34] Here, the jury verdict did not violate Hyles's Sixth Amendment right to a jury trial. Jury Instructions 30 and 32 specified one element was that the death of Smith resulted from the conspiracy to commit murder for hire (Count I), and the aiding and abetting murder for hire (Count II). Jury Instruction 32, on Count II, expressly stated that the Government had to prove all the elements of the offense beyond a reasonable doubt. Jury Instruction 28 also specifically stated this with regard to Count I. Therefore, for the jury to convict on Counts I and II, the jury necessarily had to find that the death of Smith resulted. Because the jury returned guilty verdicts on both counts, the district court properly imposed a life sentence. See id.

VII.

Hyles claims the district court erroneously allowed the Government to introduce two hearsay statements: (1) Leatherwood testified that Cannon called her on August 14 and told her that Hyles was picking him up in Memphis to bring him to Caruthersville; and (2) Carter testified that Tyrese told him that "he would have did it for me."

Hyles did not object to these statements at trial; this court reviews for plain error. See United States v. Olano, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); United States v. Eagle, 515 F.3d 794, 802 (8th Cir.2008).

[35] [36] An out-of-court statement is not hearsay if it is offered against the defendant and is a statement of the defendant's co-conspirators made in furtherance of the conspiracy. Fed.R.Evid. 801(d)(2)(E); United States v. McKay, 431 F.3d 1085, 1093 (8th Cir.2005). Though this court interprets " 'in furtherance of the conspiracy' broadly, 'a statement that simply informs [the] listener of the declarant's criminal activities is not made in furtherance of the conspiracy.' " Id., quoting United States v. Manfre, 368 F.3d 832, 838-39 (8th Cir.2004). In order to admit the co-conspirator statements, the government must establish by a preponderance of the evidence that "(1) a conspiracy existed, (2) both the declarant and [Hyles] were members of it, and (3) the declarant made the statement in the course and in furtherance of the conspiracy." See United States v. Mahasin, 362 F.3d 1071, 1084 (8th Cir.2004).

[37] [38] [39] Here, there is no plain error in admitting the two statements. The government established that a conspiracy existed, that Cannon, Carter, and Tyrese were co-conspirators with Hyles in it, and that Cannon's statement to Leatherwood was made in the course and in furtherance of the conspiracy. See United States v. Jordan, 260 F.3d 930, 933 (8th Cir.2001), citing United States v. Johnson, 925 F.2d 1115, 1117 (8th Cir.1991) (statements identifying participants and discussing various roles admissible). Cannon's statement is admissible also as a hearsay exception to show his then existing state of mind. See Fed.R.Evid. 803(3) ("statement of declarant's then existing state of mind ... (such as intent, plan, motive, design)"). This statement is not excluded by the hearsay rule. Id. Moreover, Hyles cannot demonstrate prejudice because her own witness testified she brought Cannon from Memphis. Hyles also cannot show any prejudice*960 in admitting Carter's testimony. Hyles is not directly implicated in the testimony, and she does not contest that there was a conspiracy between Tyrese, Carter and herself, to kill Smith.

[40] [41] Hyles also contends that the statements violated her rights under the Confrontation Clause of the Sixth Amendment and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "The Confrontation Clause bars the admission at trial of the testimonial statements of a witness who is absent from trial, unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine him." Eagle, 515 F.3d at 802, citing Crawford, 541 U.S. at 53-54, 124 S.Ct. 1354. Here, the statements are non-testimonial. See id. at 51, 124 S.Ct. 1354 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a

person who makes a casual remark to an acquaintance does not."). Neither Tyrese nor Cannon were making formal statements, nor were their "statements elicited in response to government interrogation." United States v. Johnson, 495 F.3d 951, 976 (8th Cir.2007), petition for cert. filed (U.S. Feb. 19, 2008) (No. 07-9456). In other words, they did not bear testimony. See id. Therefore, Crawford is inapplicable.

VIII.

The judgment of the district court is affirmed.

APPENDIX 2

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI SOUTHEASTERN DIVISION

Case No. 1:05CV57 HEA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)

TONYA JOHNSON HYLES,)

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on the Report and Recommendation of United

States Magistrate Judge Lewis M. Blanton, [Doc. # 64], pursuant to 28 U.S.C. § 636(b). Both defendant and the government have filed Objections to the Report and Recommendation, which recommended that defendant's Motion to Suppress Evidence and Statements, [Doc. #. 26], and her Motion for Specific Performance, [Doc. # 27] be denied. Further, Judge Blanton ordered defendant's Motion to Disqualify the United States Attorney for the Eastern District of Missouri, [Doc. #39], and the government's Motion for Reconsideration of and Objections to Order Denying Government's Motion to Strike Defendant's Testimony, [Doc. # 55],

denied. Defendant's Motion for Sanctions, [Doc. 40], was ordered withdrawn, per defendant's request.

When a party objects to the magistrate judge's report and recommendation, the Court must conduct a *de novo* review of the portions of the report, findings, or recommendations to which the party objected. See *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir.2003) (citing 28 U.S.C. § 636(b)(1)). This includes a *de novo* review of the magistrate's findings of fact, including any credibility determinations. *Id.* The court has reviewed the entire record, including reading the transcripts and listening to the audio recordings of the hearings held on October 27, 2005 and November 4, 2005.

Defendant's Objections

Initially, defendant objects to Judge Blanton's recommendation that her Motion to Suppress Evidence and Statements be denied. Defendant argues that Judge Blanton's refusal to grant her oral motion for a body attachment of April Leatherwood, a subpoenaed witness, deprived her of her right to present evidence in support of her motion or, alternatively, to present a witness to rebut the facts testified to by the government's witness. Although defendant testified at the hearing on November 4, 2005, she did not testify that Sergeant Lockett threatened that her children would be taken from her and placed in foster care. Defendant continues to maintain that the witness would support defendant's claim that defendant was threatened. The Court, however, agrees with Judge Blanton's conclusion that what was told to the witness regarding the witness' children, which defendant claims is the gravamen of the proposed witness' testimony, is irrelevant as to the allegations of threats

to defendant. Defendant's objection is overruled.

Defendant also objects to Judge Blanton's recommendation that her motion for specific performance be denied. As defendant correctly quotes, the proffer letter states, in part, "[i]n the event that the information contained in [defendant's] proffer is deemed by this office to be truthful, candid, and meritorious, this office will engage in negotiations involving specific concessions which will be made on behalf of the Government in exchange for [defendant's] further cooperation." Defendant asks the Court to order the government to perform the last statement of the proffer letter. Defendant fails to observe the salient inquiry: whether the information is deemed by the United States Attorney's office to be truthful, candid, and meritorious. Thus, in order for further negotiations to occur, pursuant to the proffer letter, the United States Attorney's office had to determine that defendant was being truthful, candid and that the information she provided was meritorious. This determination was not made, based on the inconsistencies in defendant's statements and the U.S. Attorney's perception that defendant was not being totally forthcoming with everything she knew. The U.S. Attorney was therefore not required to engage in further negotiations.

Defendant's reference to the FBI case agent Bruns' testimony does not establish the United States Attorney's assessment of defendant's assistance. Clearly, the question posed to Agent Bruns was as to his knowledge as to why the charges against defendant were dismissed. Agent Bruns responded to the question posed: "Q: So, to your knowledge, were the charges dismissed because of the negotiations between the government and myself? A: Yes. What those details were, I do not know, but yes." (Emphasis added). This

statement merely sets forth the agent's belief as to the negotiations and his belief as to the reason the initial charges were dismissed. It establishes nothing further with respect to the United States Attorney's determination of defendant's candor. Agent Bruns' testimony leading up to the above question and answer demonstrates other rationale for dismissing the initial indictment. Agent Bruns testified as follows: "Yes, the fact that the trial date on Ms. Hyles was approaching, was quite near, and we had the issue of pursuing charges against Mr. Cannon and Mr. Hyles, and those were the primary focus of the investigation of the prosecution, so we wanted to pursue that first, and then consider Ms. Hyles at a later time." Furthermore, Agent Bruns testified at the first hearing that they, (Agent Bruns and the Assistant United States Attorney), felt defendant was still not giving them everything she knew. He specifically testified that the indictment was not dismissed because they thought defendant was not telling the truth and telling them everything she knew about the incidents. Agent Bruns also testified that defendant stopped being a useful witness on February 8, 2005.

Defendant claims that the relevant inquiry is: Was there an agreement between the parties that resulted in the dismissal of the previous indictment. Defendant argues that there was such an agreement and asks the Court to enforce the agreement. The record is clear, however, based on the proffer letter, defendant's actions *vis a vis* the proffer, the determination by the United States Attorney's office that defendant had not given complete, truthful and candid information, and the testimony presented to the Court that an agreement defendant seeks to enforce was never formed. The government clearly articulated in its proffer letter that the government was agreeing,

at that point, to the interview and that before the government would come to an agreement with defendant, she must submit to the interview with law enforcement officers and/or Assistant United States Attorneys for the purpose of assessing the credibility and value of the assistance, evidence and possible testimony that she could provide. As a further *proviso* and *caveat*, the government included in this letter the following disclaimer: "Only if the Government determines that your client's information and ability to develop information is honest, reliable and worthwhile, will the Government enter into any agreement." Defendant accepted these conditions through her signature under the "Accepted" section attached to the proffer letter. Thus, without defendant satisfying the conditions precedent set forth in the proffer letter, there could be no agreement. Defendant's objection to Judge Blanton's Recommendation is therefore overruled.

Government's Objection

The government "objects" for the record to the denial of its motion to strike defendant's testimony and subsequent motion for reconsideration. Pursuant to 28 U.S.C. § 636(b)(1)(A), this Court may only reconsider any pretrial matter under subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A). In his Order of December 13, 2005, Judge Blanton articulates his reasoning for denying the motion to strike, and carefully assesses the law and its application to the facts underlying defendant's refusal to answer questions posed by the government. In denying the motion to strike, Judge Blanton also admonished that defendant's refusal may be a double edged sword in that her refusal may affect her then

pending motion for specific performance. When the entire record before the Court is considered as well as the circumstances surrounding defendant's refusal to answer the governments questions, the Court cannot conclude that Judge Blanton's Order was either clearly erroneous or contrary to law. The government's "objection" is therefore overruled.

Based upon the foregoing, the objections to the Report and Recommendation are overruled. The Court adopts Judge's Blanton's Report and Recommendations in its entirety.

Accordingly,

IT IS HEREBY ORDERED that defendant's Motion to Suppress Evidence and Statements, [Doc. #. 26], and her Motion for Specific Performance, [Doc. # 27] are denied.

Dated this 6th day of March, 2006 EDWARD AUTREY UNITED STATES DISTRICT JUDGE

/S/ Henry Edward Autrey